

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA**

<b>RODNEY A. BALLARD,</b>	)	<b>CASE NO. 4:07CV3122</b>
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>MEMORANDUM</b>
	)	<b>AND ORDER</b>
	)	
<b>DAVID HEINEMAN, Governor,</b>	)	
<b>individually and in his official</b>	)	
<b>capacity, JON BRUNING, Attorney</b>	)	
<b>General, individually and in his</b>	)	
<b>official capacity, JEFFREY MEYER,</b>	)	
<b>Lincoln County Attorney, individually</b>	)	
<b>and in his official capacity, and</b>	)	
<b>TROOPER NO. 371, individually and</b>	)	
<b>in his official capacity,</b>	)	
	)	
<b>Defendants.</b>	)	

The matters before the Court are: (1) the Motion of Defendant Lincoln County Attorney Jeffrey Meyer to Dismiss (Filing No. 9); (2) the Motion of Defendants Attorney General Jon Bruning, Governor David Heineman, and Trooper No. 371, to Dismiss (Filing No. 17); (3) the Motion of Attorney General Jon Bruning, Governor David Heineman, and Trooper No. 371, to Strike the Plaintiff's Amended Complaint, or, in the Alternative for an Enlargement of Time to Respond to the Amended Complaint (Filing No. 25); and (4) the Plaintiff Rodney A. Ballard's Objection to Defendants' Motion to Strike and Motion for Costs and Fees (Filing No. 26).

The Plaintiff Rodney A. Ballard ("Ballard") filed his Complaint (Filing No. 1) on May 1, 2007. Defendant Lincoln County Attorney Jeffrey Meyer ("Meyer") moved to dismiss the Complaint on May 22, 2007 (Filing No. 9). Ballard filed an Amended Complaint (Filing No. 14) on Saturday, June 30, 2007, and Defendants Attorney General Jon Bruning ("Bruning"), Governor David Heineman ("Heineman"), and Trooper No. 371, filed their

Motion to Dismiss (Filing No. 17) on Monday, July 2, 2007, seeking dismissal of the original Complaint (Filing No. 1). On Tuesday, July 3, 2007, Bruning, Heineman and Trooper No. 371 moved to dismiss the Amended Complaint because it was filed “without permission from the Court and without written consent of the adverse parties as required by Fed. R. Civ. P. 15(a).” (Filing No. 25, p.1). On the same day, Ballard filed his “Objection to the Defendants’ Motion to Strike,” which is construed as a brief in opposition to the Motion,<sup>1</sup> and his “Motion for Costs and Fees.” (Filing No. 26).<sup>2</sup>

Fed. R. Civ. P. 15(a) provides that a “party may amend the party’s pleading once as a matter of course at any time before a responsive pleading is served . . . .” As Ballard correctly observes in his opposition to the Motion to Strike, the United States Court of Appeals for the Eighth Circuit has held that “[a] motion to dismiss is not a ‘responsive pleading’ for purposes of this rule.” *Winfrey v. Brewer*, 570 F.2d 761, 764 n.4 (8th Cir. 1978); see also *Crestview Vill. Apts. v. U.S. Dep’t of Hous. & Urban Dev.*, 383 F.3d 552, 557–58 (7th Cir. 2004); *Doe v. United States*, 58 F.3d 494, 496–97 (9th Cir. 1995); *Fortner v. Thomas*, 983 F.2d 1024, 1032 (11th Cir. 1993); *Barksdale v. King*, 699 F.2d 744, 746–47 (5th Cir. 1983); *Adams v. Campbell County Sch. Dist.*, 483 F.2d 1351, 1353 (10th Cir. 1973); *Smith v. Blackledge*, 451 F.2d 1201, 1202–03 (4th Cir. 1971); *Kelly v. Del. River Joint Comm’n*, 187 F.2d 93, 94 (3d Cir. 1951).

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<sup>1</sup> See NECivR 7.1 (b)(1)(A).

<sup>2</sup> The Court will not await the expiration of the response times with respect to these motions, because even if Ballard did not have a right to amend his Complaint as a matter of course, he could have amended the Complaint by leave of court, which “shall be freely given when justice requires.” Fed. R. Civ. P. 15. This Court would have exercised its discretion to grant Ballard leave to file the Amended Complaint if he had lacked the right to do so as a matter of course under Rule 15.

Accordingly, the Defendants' Motion to Strike will be denied, the Defendants' Motions to Dismiss the original Complaint will be denied as moot, the Defendants' Motion for Enlargement of Time to respond to the Amended Complaint will be granted in part, and all Defendants will respond to the Amended Complaint within 20 days of the filing of this Memorandum and Order.

IT IS ORDERED:

1. The Motion of Defendant Lincoln County Attorney Jeffrey Meyer to Dismiss (Filing No. 9) is denied as moot;
2. The Motion of Defendants Attorney General Jon Bruning, Governor David Heineman, and Trooper No. 371, to Dismiss (Filing No. 17) is denied as moot;
3. The Motion of Defendants Attorney General Jon Bruning, Governor David Heineman, and Trooper No. 371, to Strike the Plaintiff's Amended Complaint, or in the Alternative, for an Enlargement of Time to Respond to the Amended Complaint (Filing No. 25), is denied in part and granted in part as follows:
  - a. The Motion to Strike the Amended Complaint is denied;
  - b. The Defendants shall respond to the Amended Complaint within 20 days of the filing of this Memorandum and Order;
4. The Plaintiff Rodney A. Ballard's Objection to Defendants' Motion to Strike (Filing No. 26) is construed as a brief in opposition to the Motion to Strike, and his Motion for Costs and Fees (also within Filing No. 26) is denied; and

5. All Defendants will respond to the Amended Complaint within 20 days of the filing of this Memorandum and Order.

DATED this 6<sup>th</sup> day of July, 2007.

BY THE COURT:

s/Laurie Smith Camp  
United States District Judge